

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

United States Courts
Southern District of Texas
ENTERED

DEC 21 2001

Michael N. Milby, Clerk of Court

MARK NEWBY,

Plaintiff,

VS.

ENRON CORPORATION, *et al.*,

Defendants.

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CIVIL ACTION NO. H-01-3624 ✓
(Consol. Securities Suits),
CIVIL ACTION NO. H-01-3913
(Consol. ERISA Suits),
AND
CIVIL ACTION NO. H-01-3645
(Consol. Derivative Suits).

NOTICE TO COUNSEL

Before making any substantive rulings in these consolidated cases, this court provides the following information to counsel to ensure the integrity of the litigation process.

Among the many lawyers who have appeared as counsel of record are two individuals with whom this judge has long standing friendships: Richard B. Drubel, who with David Boies of Boies, Schiller & Flexner, L.L.P. and Craig Smyser of Smyser, Kaplan & Veselka, L.L.P., is counsel for one of the defendants; and Jacks C. Nickens, who with Paul D. Flack of Clements, O'Neill, Pierce, Nickens & Wilson and R. Michael Peterson of the Law Offices of R. Michael Peterson, is counsel for a group of officer defendants. Mr. Nickens has been a friend of the judge's husband since they were college suitemates and, in 1982, served as his best man in the judge's

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wedding. Mr. Drubel and his wife, who have lived in New Hampshire for the last several years, are godparents to one of the judge's four children.

Canon 3 of the Code of Conduct for United States Judges and 28 U.S.C. § 455(a) list specific situations in which a judge must disqualify herself, none of which applies here. The statute and corresponding Code provisions also contain a “catch-all” requirement for disqualification in situations “in which [a judge's] impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Friendships with counsel, even long standing and close ones, are alone not sufficient to raise an appearance of impropriety. *See Henderson v. Dept. of Public Safety and Corrections*, 901 F.2d 1288 (5th Cir. 1990) (arguments that judge had known lawyer since childhood and remained good friends with him were not sufficient for recusal). In a case involving allegations of an appearance of impropriety, the Fifth Circuit observed that “[m]any courts . . . have held that a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer.” *Travelers Ins. Co. v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404 (5th Cir. 1994) (internal citations omitted); *see also Carter v. West Pub.*, 1999 WL 994997 (11th Cir. 1999) (Tjoflat, J., denying motion for recusal).

An opinion of the Advisory Committee on Judicial Activities provides useful guidance. Examining whether a judge should recuse when “one of the

attorneys is a friend of long standing and served as a godparent to one of the judge's children," the Committee first noted that judges obviously should continue to have friends and participate in society. The Committee noted that a godfather is not a relative: a godfather "may in some cases become a very close friend and almost part of the family," which would raise questions, but in many cases, the relationship is much less involved and raises no issues. A judge faced with this situation must determine: (1) whether she feels capable of disregarding the relationship; and (2) whether others can reasonably be expected to believe that she has disregarded it. *See* Advisory Opinion 11 (1970), *available in* II GUIDE TO JUDICIARY POLICIES AND PROCEDURES IV-21 (2001), Compendium § 3.6-8(g), II GUIDE TO JUDICIARY POLICIES AND PROCEDURES V-55 (2001). The latter inquiry is an objective one, based upon "how things appear to the well-informed, thoughtful and objective observer." *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995).

Mr. Drubel and Mr. Nickens are "within the wide circle of friends," but not "almost a part of the family." This judge is fully capable of disregarding these relationships and believes that any "well-informed, thoughtful and objective observer" can reasonably be expected to believe she has done so. *Jordan*, 49 F.3d at 156; *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

This case involves an extraordinarily large number of lawyers and law firms representing parties on all sides. Many of the lawyers are well known professionally and/or socially to this judge, and would be to other judges as well. No lawyer has an advantage or disadvantage in this court as a result. Although no further action is required, in the interest of the integrity of this process, this court will extend the deadline for objecting to the consolidation order to January 3, 2001.

SIGNED on December 21, 2001, at Houston, Texas.

A handwritten signature in black ink, appearing to read "Lee H. Rosenthal", is written over a horizontal line.

Lee H. Rosenthal
United States District Judge